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HOW CAN ADR ALLEVIATE LONG-STANDING SOCIAL PROBLEMS?

*Kenneth R. Feinberg**

KEYNOTE ADDRESS

Thank you very much.

The Dean said that academic criticism was leveled primarily at the statute.¹ I can assure you that the families did not make that distinction. The families did not want to know, “Well, I’m constrained by the statute.” That approach got me nowhere in trying to explain the vagaries of this law.

Four different reasons bring me to Fordham.

The first and most important reason is that John Feerick asked me, and one does not say no to John Feerick. You think you can say no, you brace yourself to say no, but it’s the way he asks you to do something: “Will you find time? Can you possibly? I’d be so grateful.” By the time he is finished asking you, you are ready to attend the class for a week. The second reason is to return to Fordham, this fabulous school and this great institution. I am glad to be part of anything that Fordham does. The third reason: I find the subject matter extremely cutting edge. I do a lot of alternative dispute resolution, but it has never been quite packaged and posited in terms of social justice and individualized justice. The subject intrigued me.

And finally, I am here to thank people. This is a rather sophisticated crowd. The 9/11 Fund is now history, but this is an opportunity to thank the people from Safe Horizons, who helped us immeasurably in resolving individual 9/11 claims, and the members of the bar. Two thousand people in the 9/11 Fund were represented pro bono by members of our legal profession.² We would have never been successful without the bar, and I am here to thank everyone who made that possible.

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1. Air Transportation Safety and System Stabilization Act, tit. IV, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 28 C.F.R. § 104 (2002)).

2. See KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 70-72 (2004), available at http://www.usdoj.gov/final_report.pdf [hereinafter FINAL REPORT].

I will try to explain how the 9/11 Fund was a perfect example of today's forum, "ADR as a Tool for Achieving Social Justice," and, specifically, the main panel this morning on "Mechanisms for Creating Individual Justice in the Face of Disaster." We have a very sophisticated audience here today. I see not only John Feerick, who knows as much about ADR as anybody alive, but my Deputy Special Master Jordie Feldman. Jordie was with me for thirty-three months helping to design, implement, and administer the program. Peter Steenland, the former head of ADR at the Department of Justice, is here, with whom I've worked and who really understands these issues. I must also point out the presence of Michael Cardozo, the Corporation Counsel of the City of New York. I got to know Michael very well during the 9/11 Fund. We set up a hotline, and we must have telephoned each other three times a week about the Fund and its impact on New York City. He is an extraordinary public servant. I am very much in Michael Cardozo's debt and have formed a friendship with him that will last a lifetime. He helped make the Fund work, and our collective coordination had a practical impact on this City and on thousands of lives in this City.

THE 9/11 FUND

Since you all know a lot about 9/11, let me briefly remind people about the statute. Eleven days after 9/11, Congress passed a law, signed by the President, which said that anybody who lost a loved one on 9/11 as a result of the attacks, or anybody who was physically injured in the attacks, could voluntarily waive their right to litigate against domestic would-be tortfeasors—the airlines, the World Trade Center, the Port Authority, Mass. Port, security guard companies, Boeing Aircraft, et cetera—and instead could participate in a no-fault, administrative, legislatively pronounced compensation fund program.³ The statute said: you don't have to, but if you want to, come on in and get your money.⁴

The money was entirely funded by you, the taxpayer. Not a nickel came from private sources, like the airlines or the World Trade Center. It was all paid for by the taxpayer, and the awards were unprecedented. The statute did not specify how much to give to each claimant, but the statute did require that I take into account the economic wherewithal of the victim—like tort based economic loss.⁵ For example, what would the victim have earned but

3. Air Transportation Safety and System Stabilization Act § 405.

4. *Id.*

5. See 28 C.F.R. § 104.41-104.47 (2002).

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for 9/11? That calculation guaranteed huge awards, with each individual getting a different amount of money. It was very provocative, very divisive, and *very* controversial. But the result was that the average award that we paid out under this program for a death was about \$2 million, tax-free.⁶ The average award for a physical injury was about \$400,000, tax-free.⁷

As you all know, there were not many physical injuries arising out of 9/11—you either got out of those buildings and planes or you did not. The number of serious physical injuries on 9/11 was on the order of several dozen, and they were mostly burn victims. The majority of the physical injury claims that we paid occurred after the attacks, such as the 2,000 respiratory damage claims that we paid arising out of the cleanup at the World Trade Center. Those people all got paid, but that was post-9/11. Fortunately, there were only a handful of physical injury claims on 9/11.

The smallest award we paid was \$500 for a broken finger at the World Trade Center. The largest award we paid, \$8.6 million, was given to a survivor who came to see us with third-degree burns over eighty-five percent of her body. Seven thousand, four hundred and three people applied, five thousand, three hundred people were found eligible, and \$7 billion of your money was spent under the program.⁸

There was no appropriation for this program.⁹ Congress in its wisdom delegated the authority to one person, appointed by the President and the Attorney General—it turned out to be me—and said, “Ken, whatever you authorize, it will be paid out of petty cash from the U.S. Treasury.” Congress did not know what this program would cost. And we implemented the program over thirty-three months.¹⁰

INDIVIDUALIZED JUSTICE IN THE 9/11 FUND

How did the Fund promote individualized justice as an alternative to the litigation system? As Dean Feerick mentioned, ninety-seven percent of all eligible claimants entered the Fund.¹¹ Today

6. FINAL REPORT, *supra* note 2, at 110 tbl. 12.

7. *Id.* at 109 tbl. 11.

8. *Id.*

9. See Air Transportation Safety and System Stabilization Act, § 406(b).

10. See FINAL REPORT, *supra* note 2, at 1.

11. See *id.* (stating that “[n]early every family of an individual killed in the September 11th attacks chose to participate in the Fund”).

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there are only about forty families in the Southern District that are still litigating death claims.

But there are a huge number of physical injury claims being litigated, because a lot of people with alleged respiratory illnesses manifested those illnesses after the 9/11 Fund shut down.¹² They were not eligible at the time to get compensation, much to Michael Cardozo's regret. But the program expired by statute, and the thousands of people that are now litigating—whom I assume would have been covered under the Fund—are now in court because the Fund no longer exists. Senators Clinton and Schumer, New Jersey senators, and Connecticut senators have introduced legislation to reopen the Fund to cover these victims in New York.¹³ In my opinion, there is little chance of that legislation being enacted. But elementary fairness says to me that something should be done. But that's a story for Michael Cardozo, or for another day.

How was the Fund a success or failure in the quest for individualized justice in a mass disaster case? In large part, if you look at Fund procedures, I believe it was a stunning success. The statistics bear it out: ninety-seven percent of eligible claimants came into the Fund. There were ninety people originally who sued the airlines, of whom roughly fifty have settled; there are still forty cases pending. I do not think they can win those cases, but they have a right to litigate if that is what they want to do. I do not mind that, but what bothered me greatly was that eleven people who were eligible to recover from the Fund did nothing. They never filed a lawsuit; they just sat on their hands and allowed the Fund deadline to run out, and they never did a thing.

Jordie and others went and saw those people. "File," we would say, "You only have three more weeks, four more weeks." "Go away, Mr. Feinberg. I lost my son. I can't get out of bed. I'm clinically depressed, paralyzed, I can't move, I can't think. It's all about numbers. I lost my son." Eleven people were so overcome with grief that they let the statute expire and did nothing. That was my biggest disappointment. If I could have hit them over the head with a bat to get them to do it, I would have, but they never came

12. See Air Transportation Safety and System Stabilization Act §405(a)(3) ("[n]o claim may be filed . . . after the date that is 2 years after the date on which regulations are promulgated . . ."); see also 28 C.F.R. §104.62 (2002) ("no claim may be filed under this part after December 22, 2003").

13. See S. Amdt. 4958 to H.R. 4954, 109th Cong. (2006) (unenacted) for the statute sponsored by Senator Clinton to establish a grant program for individuals still suffering health effects as a result of the September 11, 2001 attacks in New York City.

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in, and they lost their chance. And they have not filed lawsuits either. They are just bereft with grief. I learned a lot about grief in administering this Fund.

Where did we succeed with individualized justice in the face of mass disaster? The primary way we succeeded was in tailoring awards to individuals through an ADR-type mechanism.

First, we made sure that every single eligible claimant had an opportunity to come see me, vent, and have a personalized, customized hearing—due process.¹⁴ I must tell all the experts here that at the outset of this program I was initially uncomfortable about permitting every family member or every victim to have a hearing. You know what you run up against: the minute I went down that road, I expected inefficiency, delay, controversy, no checks going out, public dissatisfaction. All of those obstacles in my mind prompted me to ask when we were drafting the guidelines, “Do we really want to give people in grief, so soon after the triggering event, an opportunity to be heard?” So we thought about it. We concluded (thank goodness), “Yes. Let’s overcome whatever presumptions or assumptions we have about the problems associated with hearings and give everybody in grief an opportunity, if they so desire, voluntarily to come and see us. Maybe that will help the bona fides of the program.” Did it help? Of course, it turned out to be the essential reason that the program was so successful. It was a wonderful idea that an individual in grief—who lost a husband or a wife or a sibling or a parent—could receive a chance if she wanted to come in, sit down, with a reporter present, under oath, confidentially, and tell her story to the Special Master.

I conducted 1,500 individual hearings. The staff did another 1,000 hearings. When I looked back and asked why the program resulted in a ninety percent sign-up rate and why was it so successful, I realized it was the hearings. People came to the hearings. They walked out and they told their next-door neighbor: “Life is unfair. They listened. Mr. Feinberg was empathetic”—at some point he got more empathetic—“he was empathetic, they appreciated the arguments, they didn’t cut us off, we had a chance to vent our emotion, and we think we were treated with respect.” I believe the character of those hearings, as much as any other single factor, contributed to the program’s success.

14. See FINAL REPORT, *supra* note 2, at 17-18 (providing a general overview of the hearing process and emphasizing the hearing process’ vital role in the success of the fund).

STORIES FROM THE FUND

It was a heavy burden on me and on Jordie and the others that held the hearings, because you would not believe the stories we heard at these hearings. Do not forget: this is not like most or all of my assignments prior to 9/11, where I would be a mediator or a special master years after the triggering event, as the litigation comes up the pipeline. The Dean mentioned Agent Orange; I got involved in the Agent Orange litigation seven years after veterans were exposed to Agent Orange in Vietnam. But in the 9/11 Fund, we were holding hearings only months after 9/11, even before some of the bodies had been recovered. And so what we heard at these tailored, individualized hearings defied description.

A twenty-four-year-old woman came to see me, sobbing. “Mr. Feinberg, I lost my husband on 9/11. He was a fireman at the World Trade Center. He left me with our two children, six and four. I’m here to tell you, Mr. Feinberg, I need my money, and I need it in thirty days.” I look at her and I say, “Mrs. Jones, it’s terrible what happened. Why? Why do you need us to accelerate your payments?” She said, “Why? I’ll tell you why, Mr. Feinberg. I have terminal cancer. I have eight weeks to live. My husband was going to survive me and take care of my two little children. Now they’re going to be orphans. And I need that money.” We accelerated the payments and we went to her funeral seven weeks later.

That’s what we heard at these hearings. People didn’t come to these hearings to argue about money. It was rare that anybody came in with a script detailing why they wanted more compensation. People came to vent at the symbol, the human symbol of the United States government.

“Mr. Feinberg, I lost my husband on 9/11. He was a fireman. He rescued thirty people from Tower One and brought them to safety to lower Broadway. The battalion chief said, ‘Stay here, it’s too dangerous.’ He said, ‘Chief, I’ve never disobeyed you before, but there are ten people trapped over there in that mezzanine and I’m going back.’” Then, this sobbing widow says to me, on the record, “Mr. Feinberg, while he was running back across the World Trade Center Plaza, he was killed by somebody who jumped to their death from the 103rd floor and hit him. If he had taken one step either way, Mr. Feinberg . . . where is the justice?”

A seventy-year-old man told a story: “Mr. Feinberg, I lost my son at the Pentagon. He got out of the building when the plane hit. He was safe. He thought his sister was trapped. He went back into

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the burning building to look for his sister, who had escaped from a side door. He died looking for her. There is no God.”

It is an amazing thing when you give people an opportunity to tell their stories in a non-adversarial environment—not a court; this is a non-adversarial system we set up. We were a fiduciary. We were looking for ways to get people money—not save it—consistent with the rules, regulations, and the statute. We were trying to get people to comply with the terms and conditions of the law so that we could give them the money. It was non-adversarial from day one; that was critical. The families gradually came to recognize that. But when they came to see me it was not as if they said, “Let me give you five reasons why my husband would have earned a million dollars.” That was only an afterthought.

The meetings were more like this: “Mr. Feinberg, thank you very much for giving us an opportunity for this hearing. We very much appreciate your willingness to see us. Now, I’d like to start off the hearing, Mr. Feinberg. I was married to my wife for twenty-five years. I’d like to start this hearing off by showing you a video of our wedding twenty-five years ago. I’d like you to see the video. Thank you, Mr. Feinberg. Now that that’s over, I’m now ready to continue my hearing. Let’s go through the wedding album page by page.” Diplomas, certificates, ribbons, medals—the memorabilia that we collected in these hearings, which we returned at the end of the program, filled up a room. We kept a record of everything.

Another: “Mr. Feinberg, I’m here for my hearing. I’d like to start off the hearing, Mr. Feinberg, by playing for you the audiotape of my husband calling me from the 103rd floor to say goodbye. Now, I kept it on the voice message machine. It’s the last words I have from my screaming husband suffocating to death on the 103rd floor. I’d like you to listen.” I replied, “Well, Mrs. Jones, let me just say that you don’t really have to play that because it won’t have any bearing on our calculations.” “I’d like you to listen to what those people said.” “Go ahead, play the audio, the tape.”

The process was incredible. Letting these people come in, in a non-adversarial situation, and allowing them to vent helped make the program a success. I am now a big believer in due process hearings in administrative proceedings. I do not worry much anymore about administrative inefficiency or delays when you have a program like this, where emotion and grief are at the top of the agenda of things that you have to deal with. If you want individualized justice in a mass disaster setting, it is critically important that the United States is not some faceless bureaucracy, but that people

know that there are really human beings running the program that you can come and talk with on the record and to whom you can vent.

But not all of the stories I heard were tragic encounters with the Grim Reaper. To resolve some of the puzzles we heard, you'd have to be Solomon.

This is a very sophisticated audience here; how would you have dealt with this example? A sobbing woman comes to see me, she is about twenty-five or twenty-six years old. "Mr. Feinberg, I lost my husband at the Pentagon. He was a fireman and he was Mr. Mom. Every day that he wasn't at that firehouse he was home teaching the six-year-old how to play baseball, teaching our four-year-old how to read, reading a bedtime story to the two-year-old. And what a chef, what a cook. He cooked all the meals. He cleaned the house. He was Mr. Mom, my best friend. He's gone. I loved him so. I'll never be the same. How will I live without Mr. Mom, my husband? How will my children survive?"

She leaves. The next day, I get a telephone call from a lawyer in Queens. "Mr. Feinberg." "Yes?" "Now look, I'm not trying to cause you any trouble." Right away I think, "Uh oh." "I'm not trying to cause you any trouble, Mr. Feinberg. Did you meet yesterday with the woman with the three kids, six, four, and two?" "Uh-huh." "And Mr. Mom, her best friend?" "Uh-huh." "Now look, I don't know how you want to deal with this, Mr. Feinberg, but you've got to know that, unbeknownst to her, Mr. Mom has two other kids by his girlfriend in Queens, five and three. Now, I'm telling you this, Mr. Feinberg, because when you cut your check there's not three biological children who survived; there are five. So I just want you to know this because those two children in Queens have every right to money under your program. You know, I'm sure you'll do the right thing. Thanks." Click.

Do we tell the woman, "Look, Ma'am, I'm going to cut a check, but I want to explain to you why some of it is going to Queens?" We hemmed and hawed. This is not law. For this you have to be a rabbi or a priest or a philosopher. We decided not to tell her. I am sure she knows by now; it is five years later. I would be shocked if she did not. But we gathered around a table: "Well, what are we going to do? Does she have a right to know this?" I did not tell her. She has a memory of her husband. Who am I? I do not know what happened here. I do not know the facts. I do not know the circumstances. We cut one check to the spouse and the three kids

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and we cut a separate check, in confidence, to the girlfriend as guardian of the two kids. That was it.

Those are Solomonic decisions to make, but we made them. We tailored individual awards and gave everybody an opportunity to be heard. That is individualized justice. Individualized justice and the opportunity to be heard can be delivered in an administrative proceeding, especially a non-adversarial administrative proceeding. So in that sense, procedurally, you can meld and integrate individualized justice through ADR in a mass disaster context.

COMPLICATIONS

After 9/11 Congress passed a law that required that everybody get a different amount of money. Substantively, the law required the Special Master to tailor individual awards to the unique economic circumstances of each claimant.¹⁵ That is individualized justice. But as I say in my book, it was not a very good idea.¹⁶ Procedurally, I understand giving everybody an opportunity to be heard. But the idea that one person is supposed to give different amounts to every claimant was problematic. It promoted divisiveness. It asked a small group of people to do what juries collectively do every day in New York City. But I do not think that asking me to look into a murky crystal ball and come up with different amounts for every individual claimant was wise public policy. But it worked this time.

Congress probably would have solved the problem more simply to say, "Everybody who is eligible gets \$250,000. Go sue if you want to sue." But that was not the purpose of the program. The purpose of the program, as you know, was to divert people out of the tort system. In order to do that you have to emulate the tort system and give people what they thought they would have earned in the tort system; otherwise, it couldn't have attracted them. It would have been a tremendous problem.

I heard from the then-Governor of Oklahoma, Frank Keating, a great guy: "Ken: You're doing a great job. It's not your fault Congress screwed up and requires you to give different amounts to every individual. That's not the way we would do things in Oklahoma. It's downright un-American. Frank."

15. See Air Transportation Safety and System Stabilization Act §§ 405-06.

16. For a more detailed account of the administration of the 9/11 Fund, see generally KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE VICTIMS OF 9/11* (2005).

I responded: “Governor Keating: You may be right. Thanks for your kind words. You may be right that Congress should have given everybody the same amount. But be very, very careful about that argument. Every day in Oklahoma juries give more to the stockbroker and the bond trader than the busboy or the waiter hit by an automobile. So I’d be very, very careful, Governor, going around saying it’s un-American to give people different amounts. You could argue, Governor, that it’s very American.”

Back comes a letter from the Governor: “Dear Ken: Thank you for your kind words. I still think Congress blew it. But I won’t say it’s un-American.” Now, that’s the key judgment: “But I won’t say it’s un-American.”

The substantive criteria, requiring people to get different amounts of money—we truly tailored the program to the individual. That’s about as tailored an individual program as you’ll ever see in America. It was unprecedented. Everybody got a different amount of money. The average award bailed by one person was \$2 million.¹⁷ And everybody got a hearing. You can’t find a program anywhere in American history that rivals this one in terms of individualized treatment, the generosity of the program, the source of the funding—it was all government and all taxpayer-funded. It was individualized justice like no program in American history.

After the horrible tragedy of Katrina in New Orleans, on the Gulf Coast, there wasn’t the slightest interest in Congress in creating something along the lines of the 9/11 Victim Compensation Fund. It wasn’t mentioned by any party, by any ideological stripe. Nobody in Congress was interested. They read the book, in part. They realized the message: “It was a great success. Let’s not do it again.”

You should read some of my emails.

“Dear Mr. Feinberg: I lost my son in Oklahoma City. Where is my check?”

“Dear Mr. Feinberg: I lost my daughter in the African Embassy bombings in Kenya. How come I’m not eligible?”

“Dear Mr. Feinberg: I lost my son on the U.S.S. Cole in Yemen, a victim of a terrorist attack, fighting terrorism. How come I’m not eligible?”

“Dear Mr. Feinberg: I don’t get it. I lost my sister in the basement of the World Trade Center in the 1993 attacks committed by

17. FINAL REPORT, *supra* note 2, at 110 tbl. 12.

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the very same people. How come I'm not eligible? Where's my check?"

You see, you've got to be careful here. The minute you go down this road, there is no way you can distinguish convincingly to me these victims from other victims. Why shouldn't they get a check? I don't see any distinction. Any distinction to me is rather hollow—except one, which I find is the one that justifies the 9/11 program. This is not from the perspective of the victim, but from the perspective of the nation. 9/11 was unique. The nation elected to demonstrate its social cohesiveness, its solidarity with the victims, its generosity in the face of a horrible, unprecedented disaster by coming to the rescue.

Looking at it from the nation's perspective is the only way I find that's convincing to justify the 9/11 Fund—not from the perspective of the victims, because from the perspective of the victims there are thousands of people every day in this country, through no fault of their own, that confront a situation that they didn't expect. And yet, the American people don't expect that every time evil befalls somebody, that person ought to get a check for \$2 million from Uncle Sam.

CONCLUSION

In my opinion it should never be done again. This was a one-off program, a unique response to an unprecedented historical event, rivaled only by the Civil War, Pearl Harbor, and the assassination of President Kennedy. That's it. The idea that this is a precedent is strange—for what is this a precedent? If Congress had waited two more weeks, they wouldn't have started this program. That is the final irony from my perspective. A program that worked so well in tailoring individual awards to individual victims should not be replicated. It should be looked at from a historical perspective as the right thing to do, like the Marshall Plan after World War II. But it should not become a precedent for anything.

Frankly, I am confident, as much as anybody can be confident of these things, that it will not be a precedent for anything and will be looked at by the American people and by historians as exhibiting the character of America at a time of great crisis, but as an aberration, a unique success.

The variables can be copied—individualized hearings, the opportunity to be heard. I'm sure we're going to hear later today about the importance of procedure and due process. But from the per-

spective of how much you get and who funds it, the 9/11 Fund will be a one-off program.

But it could never have worked without the success of the bar. And for you students, you are in a fabulous profession, the bar. When you talk about the public interest, think about the legal profession. The legal profession stepped up and helped these families in grief, in making sure the 9/11 Fund was a success.